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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 371

CITY OF NEWARK,

Appellant,

vs.

NEW JERSEY TURNPIKE AUTHORITY, A CORPORATION OF NEW JERSEY, CONSTRUCTION AGGREGATES CORPORATION, A CORPORATION OF DELAWARE AND PETER KIEWIT & SONS CO., A CORPORATION OF NEBRASKA

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

WARD J. HERBERT,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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No. 371

THE CITY OF NEWARK, A MUNICIPAL CORPORATION OF NEW JERSEY,

Appellant,

vs.

NEW JERSEY TURNPIKE AUTHORITY, A CORPORATION OF NEW JERSEY, CONSTRUCTION AGGREGATES CORPORATION, A CORPORATION OF DELAWARE AND PETER KIEWIT & SONS CO., A CORPORATION OF NEBRASKA

Appellees

STATEMENT OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

The appellees in the above-entitled cause, for their statement opposing jurisdiction herein, and in support of their motion to dismiss or affirm, respectfully show:

Introduction

The appellant, City of Newark, has contended in the New Jersey courts that a section of the New Jersey Turnpike over a mile long within the City's boundaries should be constructed on an elevated viaduct rather than on dirt fill,

and that there should be only one point within the City at which to enter and leave the Turnpike rather than two. All legal questions arising out of these factual contentions were determined adversely to the City in the State courts of original and appellate jurisdiction, it being decided that the appellee New Jersey Turnpike Authority had acted legally and within its proper scope in carrying out its well-considered plans for the construction of the highway.

The Parties

The appellant herein is a municipal corporation of the State of New Jersey. The appellee New Jersey Turnpike Authority was created by the New Jersey Turnpike Authority Act of 1948 (P. L. 1948, c. 454) for the purpose of financing, constructing and operating within New Jersey a modern express highway 118 miles in length from near the George Washington Bridge in the North to the Delaware Memorial Bridge in the South; and the Turnpike Authority has carried its work to the point where the New Jersey Turnpike will soon be open to traffic, including the section through the City of Newark about which the appellant complains. Significantly, Chief Justice Vanderbilt, writing for a unanimous court below, styled the Turnpike Authority "an independent public corporation especially created by the legislature to carry out legitimate and important functions of government."

The remaining appellees are contractors engaged by the Turnpike Authority to perform certain work on that portion of the Turnpike within the City of Newark.

The Questions Presented On This Appeal

Proceeding under 62 Stat. 929 (1948), 28 U.S.C. § 1257(2), the appellant bases this appeal upon a claim that the New Jersey Turnpike Authority Act of 1948 violates Article IV,

Section 4, and the Fourteenth Amendment of the Constitution of the United States, and states that although it raised these constitutional points in the State courts, those judicial bodies rejected its contentions and sustained the validity of the State statute.

The appellant further urges for this Court's consideration that it was deprived of its day in court by being compelled to try its case on affidavits on appellees' motion for summary judgment, all in further violation of rights preserved for it by the Federal Constitution.

I. No Substantial Federal Question Is Presented

Appellant As a Municipal Corporation Cannot Raise the Fourteenth Amendment Against State Action

Appellant argues that its rights under the Fourteenth Amendment of the Federal Constitution were abridged by the State of New Jersey, first by the Legislative Branch in enacting the Turnpike legislation, and thereafter by the Judicial Branch in granting summary judgment in appellees' favor upon a finding, made upon lengthy affidavits, that the New Jersey Turnpike Authority did not act arbitrarily and capriciously on matters questioned by the appellant.

Not only is the appellant's contention without factual basis: it misconceives the relationship between a municipality and its creator, the State, and runs counter to the well settled proposition of law that a municipal corporation cannot invoke the provisions of the Fourteenth Amendment against its State. *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40 (1907); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394, 39 Sup. Ct. 526 (1919); *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923); *City of Newark* v. *State of New Jersey*, 262 U. S. 192, 43

Sup. Ct. 539 (1923); *South Pasadena* v. *San Gabriel*, 292 U. S. 602, 54 Sup. Ct. 642 (1934).

Hunter v. *City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40 (1907), decided that the power of a State over the rights and property of cities held and used for "governmental purposes" is unrestrained by the Fourteenth Amendment. There, in upholding a Pennsylvania statute, which provided for the combining of certain contigous municipalities, against the contention of one municipality that such a union would deprive it of its property without due process of law, the Supreme Court stated (207 U. S. at pp. 178-179):

> "• • • Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. • • • The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. • • • The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

In *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923), the City, as successor to a grant made by the State to a private corporation, claimed a perpetual right, unburdened by license fee or other charge, to divert all the water from the Delaware River that it

might require for its use or the use of its inhabitants. After the City had acquired the grant from the private corporation, the State enacted legislation imposing a charge on water thus diverted in excess of a certain amount, and successfully sued the City for money due thereunder. On writ of error to review, the appellant City argued to this Court that the legislation under which the State had acted was unconstitutional and violative of the Contract Clause and the Fourteenth Amendment. This Court dismissed the writ, finding that the contention of the City did not present a substantial Federal question.

Referring to the possible distinction adverted to in the *Hunter* case, *supra*, between governmental and proprietary functions of a municipality, this Court in the *City of Trenton* case held that the legal basis for this distinction made it inapplicable to the case where a municipality sought to invoke constitutional restraints against the actions of its creating state. Having thus ruled, the Court reaffirmed the proposition that a municipal corporation is simply a political subdivision of the State and exists only by sufferance of the State and its Legislative branch.

To the same effect as the *Hunter* and *City of Trenton* cases are the other authorities hereinbefore cited, and thus it appears abundantly clear that this appeal, insofar as it is premised on legislative denial of appellant's rights under the Fourteenth Amendment, does not raise a substantial Federal question.

Having invoked the appellant jurisdiction of this Court under 28 U. S. C. § 1257(2) by attacking the constitutionality of the Turnpike statute, the appellant also urges that it was deprived of its day in court by the Judicial Branch of the State, in abrogation of its rights under the Fourteenth Amendment. Assuming, but not conceding that the appellant is entitled to raise on appeal a question which

more properly should be brought before this Court on writ of certiorari, we shall show that this contention has no merit in fact or in law. Factually, a cursory reading of the record below will reveal that on appellees' motion for summary judgment the appellant submitted comprehensive affidavits in support of its contentions that the Turnpike Authority was acting arbitrarily and capriciously in planning certain of its contemplated construction. Thus the review accorded, albeit on a motion for summary judgment, did not deprive appellant "of its day in court".

Moreover, aside from factual matters, the appellant's claim is legally ill founded, for in part at least it again attacks State action, this time action taken by the State's Judicial Branch, which construed the Turnpike statute as requiring no judicial review *de novo* of the administrative determination, but only a review to determine if the Turnpike Authority had acted reasonably, and within the proper scope of its authority. It is submitted that the State court's construction of the statute is binding upon this Court, and that in attacking the said statute, as construed, the appellant runs afoul of the doctrine of the *Hunter* and *City of Trenton* cases.

As to so much of appellant's contention as complains of the disposition of its claim summarily, by summary judgment proceedings, all that need be said is that it has cited no authorities in support of its argument that such procedure deprives it of its constitutional rights, nor could appellees discover any. On the contrary, it was early held that due process of law does not require a plenary suit and such has always been the case. *Ex Parte Wall,* 107 U. S. 265, 289-290, 2 Sup. Ct. 569 (1882).

Thus, with respect to appellant's claim on this appeal that it has been deprived of its rights under the Fourteenth Amendment, both by State legislative and judicial action, it

is appellees' contention that no substantial Federal question is presented.

No Rights of Appellant Under Article IV, Section 4 of the Constitution of the United States Have Been Abrogated

As a further assignment of errors, the appellant attacks the Turnpike statute in question on the ground that it unlawfully delegates legislative power to the Turnpike Authority because it does not provide adequate standards for administrative action; and appellant makes the unique but specious argument that such unlawful delegation of power is an abridgment of the guarantee of a republican form of government for the states provided for in Article IV, Section 4 of the Constitution of the United States.

The State court of original jurisdiction in deciding against the appellant, dealt at length with the question of adequate standards. *City of Newark* v. *New Jersey Turnpike Authority, et als.*, 12 N. J. Super. 523, 79 A. 2d 897 (Ch. Div., Jan. 1951) (see Appendix to Appellant's Brief, p. 90a et seq.). After spelling out the standards prescribed by the statute in question, that court said (12 N. J. Super. 535-536, 79 A. 2d 903) (see Appendix to Appellant's Brief, pp. 101a-103a):

> "Within the limits reasonably open to it in the matter of creating and authorizing an agency to construct a highway project, the Legislature has complied with this constitutional prohibition (meaning State Constitution) against unlimited delegation of its power."

See also, *Id.*, 7 N. J. 377, 384, 81 A. 2d 705, 708 (Sup. Ct. 1951).

Appellees believe that a reference to the statute in question, or to the opinions below, will persuade this Court to reach the conclusion reached by the lower courts. However, even if this were a case of unlawful delegation of power, it

would be a matter of local law and not within the power of this Court to decide.

In *Welch* v. *Swasey*, 214 U. S. 91, 29 Sup. Ct. 567 (1909), the plaintiff in error attacked a state statute which had established certain maximum heights for buildings in the City of Boston and had directed the Mayor to appoint a Commission to establish boundaries within which the prescribed height limits would obtain. In rejecting the claim of the plaintiff in error that its rights under the Fourteenth Amendment had been abrogated, Mr. Justice Peckham stated (214 U. S. at 104):

> "We do not understand that the plaintiff in error makes the objection of illegality arising from an alleged delegation of legislative power to the commissions provided for by the statutes. At all events, it does not raise a Federal question. The state court holds that kind of legislation to be valid under the state constitution and this court will follow its determination upon that question."

While perhaps this might be considered dictum, it is submitted that the enunciated principle of law is nonetheless sound, and that when any State delegation of power is challenged, the question raised is purely a local one, to be decided by resort to the State Constitution. *Douglas* v. *Noble*, 261 U. S. 165, 170 (1923). Moreover, the appellant, as a municipal corporation, is barred from asserting this ground on this appeal for the reasons hereinabove set forth in connection with the cases of *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40 (1907), and *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923).

There is one further reason why it is idle for the appellant to urge as a ground for this appeal that the statute in question violates Section 4 of Article IV of the Constitution of the United States, guaranteeing to every State a republican form of government. As has been decided repeatedly,

the question whether this guarantee has been violated is not a judicial but a political question, committed to the Congress and not to this Court. *Luther* v. *Borden*, 7 How. (48 U. S.) 1, 39, 42 (1849); *Taylor* v. *Beckham*, No. 1, 178 U. S. 548, 20 Sup. Ct. 890 (1900); *Pacific States Tel. & Tel.* v. *Oregon*, 223 U. S. 118, 32 Sup. Ct. 224 (1912), *Kiernan* v. *Portland, Oregon*, 223 U. S. 151, 32 Sup. Ct. 231 (1912); *Marshall* v. *Dye*, 231 U. S. 250, 34 Sup. Ct. 92 (1913); *Davis* v. *Ohio*, 241 U. S. 565, 36 Sup. Ct. 708 (1916); *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1917).

In the light of the foregoing authorities, the conclusion is inevitable that the appellant herein has failed to raise a Federal question by its claim that Article IV, Section 4 of the Federal Constitution was violated by the statute which created the New Jersey Turnpike Authority.

II. The Judgment of the State Courts Should Be Affirmed

The Turnpike Authority Provided a Hearing to the Appellant

Appellant wanted the Turnpike Authority to use a long viaduct instead of dirt fill for a portion of the Turnpike roadway within the City of Newark, and to provide Newark with only one Turnpike interchange instead of two. On this appeal appellant contends that it was not accorded a hearing on these matters before the Turnpike Authority adopted its own plans of construction.

Appellant's statement that it was not accorded a hearing is of ocurse frivolous and is clearly contradicted by the record. When the same statement was considered by the court of original jurisdiction, that court referred to the record and the stenographic evidence therein of hearings on two different occasions, and concluded (12 N. J. Super.

534, 79 A. 2d 902) (see Appendix to Appellant's Brief, 100a-101a):

> "While some of the statements made in these affidavits are in dispute, it is difficult to understand how it can be argued successfully that the City was not granted a hearing. The record is plainly to the contrary."

In connection with appellant's claim of right to a hearing, it should be noted that there is no hearing provided for in the Turnpike statute as to method of construction, property to be taken, or the course to be followed by the roadway. Instead, these matters are committed to the expert judgment and experience of the Turnpike Authority.

To deal briefly with the authorities cited by the appellant on this question of hearing (see Statement As to Jurisdiction, pp. 8-12), they merely stand for the proposition that under certain circumstances, not here present, a formal hearing must be granted. The cited case of *Handlon* v. *Town of Belleville*, 4 N. J. 99, 71 A. 2d 624 (Sup. Ct. 1950), is illustrative thereof, wherein an administrative agency exercised a power "indubitably judicial in nature", to wit, the removal and reinstatement of public officers. Clearly a hearing must be granted in such a case, and it must be a hearing of some formality. That is not so in the case now before this Court where we are dealing with administrative action of an entirely different nature.

Appellant Was Accorded a Review and Was Not Deprived of Its Day In Court

In arguing that it was deprived of its day in court by reason of not having had an opportunity to develop its facts other than by affidavit, the appellant is unrealistically claiming that the procedure of summary judgment, whereby both parties presented their cases on comprehensive affi-

davits, denied them due process. It is submitted that not only was appellant accorded a full hearing before the Turnpike Authority, but that it also was accorded proper judicial review in the State courts, not merely in form but in substance as well. See *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40, 46 Sup. Ct. 384 (1926).

Of the nature of the review accorded, a few words may be said. Mr. Justice Vanderbilt, writing for the New Jersey Supreme Court below, *City of Newark* v. *New Jersey Turnpike Authority, et als.*, 7 N. J. 377, 381, 81 A. 2d 705, 707 (Sup. Ct. 1951), stated (see opinion labeled App. "A" to Appellant's "Statement As To Jurisdiction" submitted on this appeal):

> "It . . . (the Turnpike Authority) is a body both corporate and politic analogous in many respects to a municipal corporation . . . Like a municipal corporation it is vested with and enjoys a considerable degree of discretion as to the manner in which it carries out its functions. So long as such a corporation operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion, 2 McQuillan, Municipal Corporations (3rd ed. 1949) §§ 10.33-10.37 and the numerous cases there cited . . ."

The appellate court below then affirmed the court of original jurisdiction on the point that since the Turnpike Authority was acting within the scope of its statutory powers in determining upon the location and mode of construction of the Turnpike, the only question on the motion for summary judgment was whether the pleadings, affidavits and exhibits "created an issue of fact on which a finding might be made that the Authority in adopting its plans was guilty of a palpable abuse of discretion . . ."

It is submitted that this was all the review to which appellant was entitled.

Little consideration need be given to the cases cited by the appellant at page 13 of its Statement As To Jurisdiction. They merely restate the statutory language which allows an appeal to this Court and add nothing to the legal question presented by this appeal.

Conclusion

In their papers appellees have shown that there is no substantial Federal question presented by this appeal. The attacks made upon the statute itself are not only without merit from a substantive point of view, but moreover, they seek to raise questions which this Court has constantly held are not ones which can be raised for its consideration. As to the contentions raised by the appellant that it was not accorded a hearing by the Turnpike Authority, and that it was denied proper judicial review, the contrary is emphatically set forth in the record.

WHEREFORE, it is respectfully requested that this Court dismiss the appeal herein, or in the alternative, affirm the judgment below.

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Supreme Court of the United States

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No. 371.

THE CITY OF NEWARK, a municipal corporation of New Jersey,

Appellant,

vs.

NEW JERSEY TURNPIKE AUTHORITY, a corporation of New Jersey, CONSTRUCTION AGGREGATES CORPORATION, a corporation of Delaware, and PETER KIEWIT & SONS CO., a corporation of Nebraska,

Appellees.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

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Appellees.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

Facts.

The appellant filed its complaint in the Superior Court of the State of New Jersey, seeking additional review of the conduct and procedure of the defendant, NEW JERSEY TURNPIKE AUTHORITY, an independent public corporation, and praying to enjoin it from proceeding with its contemplated construction of a planned express toll turnpike through the city of Newark. Defendant filed its answer, and then served notice of summary judgment which, after the submission of affidavits by all parties, argument, and briefs, same was granted against the appellant.

The complaint so filed and the supporting affidavits in reply to the motion for summary judgment was most com-

prehensive, detailed and specific in showing that the construction of the toll road through Newark in the manner proposed and now actually in progress is arbitrary, unreasonable and will cause great and unnecessary destruction of property and property rights, unreasonably destroy tax ratables, and unreasonably interfere with the future usability and development of property belonging both to the City of Newark in its proprietary character and to its citizens.

The allegations in the complaint and the detailed assertions in the affidavits were made by reputable, competent and disinterested persons, whose good faith was specifically recognized in the opinion of the court below; and among the many points urged were the following:

1. The unnecessary waste of about 50 acres of land due to the unconfined dirt fill type of construction in place of the more reasonable confined dirt fill or structurally supported type, thereby destroying forever tax ratables to the City and burdening its citizens with a perpetually increased taxation.

2. The unnecessary waste of about 50 acres of land, with the same consequences to the City and to its taxpayers, due to the erection of a second and superfluous interchange at Raymond Boulevard, when the same might more reasonably and more economically be erected a short distance away in the comparatively worthless land of the meadows, thereby avoiding this waste of the City's scant remaining amount of valuable industrial land.

3. The impassibility of the construction proposed where it runs through a large, undeveloped industrial area of the City, thereby completely dividing it, damaging a large area of surrounding land, and forever reducing its value to the

City as tax ratables, and forever preventing the City from realizing an already planned development in the economic interest and general welfare of the City.

4. The arbitrary lowering of the level of the toll road to five feet, dictated solely by considerations of reducing construction costs, giving the road a roller coaster character, and making it impossible to construct future City streets under the toll road, but requiring that such streets be carried over the toll road by "skyways," which is utterly impracticable and prohibitive in cost.

5. The insignificant amount of additional cost entailed by a proper construction as compared with the arbitrary and unreasonable construction determined upon by the Authority.

6. The fact that the Turnpike Authority has arbitrarily rejected all protests and suggestions of the City for a more reasonable construction, and has determined its course solely upon considerations of profit to itself and its bondholders, with complete disregard to the interests and property rights of the City and of its inhabitants.

7. The fact that the Turnpike Authority, while refusing to build the road on a viaduct as requested by the City, has changed its original plan and built a long stretch of the road on a similar viaduct to accommodate the railroads in the area.

8. The arbitrary determination as to the width and number of traffic lanes, excessive size of the parkway in the center of the highway, and of the shoulders on either side of the highway, results in a road of an unreasonable width, unnecessary by any reasonable standards of safety, and

grossly extravagant and irreparably harmful to the area of the City of Newark involved in this controversy.

9. The delegation of the power of eminent domain is limited to such land as is "reasonably necessary," in law and in fact, to the purposes of the Authority, and the complaint and affidavits raise the question of whether the proposed taking of the City's streets and other properties is "reasonably necessary," presenting issues of fact and law on which the City is entitled as of right to a full and formal trial.

10. The Turnpike Authority arbitrarily refused to consider the City's contention that any increased cost of construction would not in fact entail any additional cost to the Authority or its bondholders, but would merely necessitate the maintenance of the tolls on the road for a short time longer.

11. The method and manner of constructing the turnpike in the City of Newark is so unreasonable as to render the "Turnpike Authority Act" unconstitutional in its operation, a mixed question of law and fact as to which the City was entitled to its day in Court.

12. The methods adopted by the Authority in issuing bonds with their allegedly improper limitation as to amount and unreasonably high cost, without publicly revealing the underlying contracts and negotiations, may constitute such an abuse of power as to render its conduct unlawful or the Act, in its operation, unconstitutional.

13. The arbitrary and unreasonable methods adopted by the Turnpike Authority in this project practically con-

fiscates 66 acres of potentially very valuable land zoned for industrial development.

Notwithstanding recognition by the Court below of the good faith of the City's affidavits, the tremendous amount of damages threatened to the City and its inhabitants, running into many millions of dollars, the fact that the specific facts and allegations of the City's affidavits were not disproved, but only generally denied by the Authority's answering affidavits, and in some cases not even denied, the Court below refused to permit the City's suit to go to trial for the purpose of proving these facts and summarily dismissed it on the defendant's motion.

On appeal by the City of Newark, the Supreme Court of the State of New Jersey upheld the lower court's judgment.

The Supreme Court's opinion includes the following sentences which summarize the Court's holding on the portion of the case therein indicated:

> "In approving the test applied by the court below, however, we do not go so far as to accept the statements to be found in *State Highway Commission* v. *Elizabeth*, 102 N. J. Eq. 221 (Ch. 1928), affirmed, 103 N. J. Eq. 376 (E. & A. 1928), and in *Everett W. Cox Co.* v. *State Highway Commission*, 4 N. J. Misc. 510 (Sup. Ct. 1926), to the effect that the discretionary power of a body charged with highway construction is absolute. Such a holding would give to the Authority, a freedom even greater than that of its creator, for the Legislature itself in the constitutional exercise of its police powers cannot be arbitrary or capricious, *Reingold* v. *Harper*, 6 N. J. 182 (Sup. Ct. 1951).
>
> Not only are we of the opinion that the court below was correct in holding that the question for determination on the motion for summary judgment was whether or not the pleadings, affidavits and exhibits created an issue of fact on which a finding

might be made following trial that the authority had palpably abused its discretion, but we likewise agree with the conclusion of the court below that no such issue was presented. The papers filed in the cause reveal a decided difference of opinion as to what the best method of construction would be and as to the necessity for the Raymond Boulevard interchange, but they do not indicate either that the Authority's plans were arbitrary and capricious or that they will not carry out the mission committed to the Authority by the Legislature in a reasonably acceptable manner. The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion and under Rule 3:56-3 it was therefore entirely proper for the court below to have granted the defendants' motion for summary judgment."

Since the statute itself fails to provide for a hearing, the effect of the Court's granting of a summary judgment deprives appellant of any effective forum in which it could develop its testimony in open and established fashion to lay the foundation for a legal adjudication of whether "the Authority's plans were so far from right as to be a manifest abuse of discretion."

SUMMARY OF ARGUMENT.

I.

The decision of the Supreme Court denies the appellant a proper trial of the issues involved, in deprivation of due process of law. Appellant had filed a detailed complaint alleging in effect that it was deprived of substantial property rights of itself and its citizens by the arbitrary and unreasonable conduct of the appellee, New Jersey Turnpike Authority, whom it charged with a palpable abuse of authority. The appellees, defendants below, moved for a

summary judgment and filed affidavits in support thereof. The lower court granted such application, although substantial factual issues were raised, all of which were decided by the court below in granting the motion. The Supreme Court of New Jersey, the highest court of the State, affirmed this judgment. The statute under which the Turnpike Authority purported to act does not provide for any hearing. Consequently, the appellant has been deprived of its right to a judicial review within the meaning of due process, which is constitutionally afforded to every party so aggrieved.

II.

The appellant, although a municipality of the State of New Jersey, properly brings this suit against all of the appellees, including the New Jersey Turnpike Authority, a corporation of New Jersey. The appellant brings this suit in its proprietary capacity as the owner of some of the lands affected and as a trustee for its citizens having title and community rights which are affected. In this capacity it can bring suit to review grievous conduct against it by the State, especially the executive or judicial branches of the State. It certainly can bring an action against a corporation created by the state, such as the Turnpike Authority, which has been declared to be an independent corporation and not the *alter ego* of the State.

ARGUMENT.

POINT I.

The Federal question involved is substantial.

In sustaining the statute, although it does not provide a mode of review, the Supreme Court of New Jersey, by a summary judgment and without affording appellant a trial

"in the ordinary mode", decided an important Federal question in a manner which conflicts with applicable decisions of this Court holding generally that a fundamental requisite of due process of law is the opportunity to be heard.

See—

Grannis v. *Ordean*, 234 U. S. 385 (1914);

Morgan v. *United States of America*, 298 U. S. 468 (1936).

Also, *Lehigh Valley R. Co.* v. *Bd. of Public Utility Commrs.*, 278 U. S. 24 (1928). At page 33 the Court stated:

> "• • • The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant *in the light of all the circumstances*, in view of the importance of the crossing, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future *and other considerations similarly relevant.*
>
> "'An increase from $200,000 to $300,000 for a railroad crossing might well, under different circumstances from (p. 34) those here, *be regarded as so unreasonble* as to make the order a violation of the company's constitutional rights and to be in the nature of a confiscation. The protection of the 14th Amendment in such cases is real and not to be lightly regarded. *But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.*' (Citing many cases, including *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499; and *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, 25 S. Ct. 18." (Italics supplied.)

See also—

St. Joseph Stock Yard Co. v. *United States*, 298 U. S. 38;

Ohio Bell Telephone Co. v. *P. U. Commission*, 301 U. S. 304.

Also, in *Nashville, Chattanooga and St. L. Ry.* v. *Walters, etc.*, 294 U. S. 405, 416 (1935), the Court stated:

> "Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass *was arbitrary and unreasonable*, the Supreme Court (of Tennessee), obviously erred in refusing to consider them." (Italics supplied.)

Again, in *Southern Railway* v. *Virginia, etc.*, 290 U. S. 190 (1933), at page 198, the Court held:

> "This Court has often recognized the power of a state acting through an executive officer or body to order the removal of grade crossings, but in all these cases there was the right *to a hearing and review by some court.*" (Italics supplied.)

And, at page 199, the Court, finding that such judicial hearing had not been accorded, reversed the judgment of the State Court.

In *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91 (1912), the Court declared:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, *is inconsistent with rational justice and comes under the Constitution's*

condemnation of all arbitrary exercise of power." (Italics supplied.)

In *Ohio Bell Telephone Co.* vs. *P. U. Commission (supra)*, at page 304, the Court declared:

> "Regulatory commissions have been vested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. • • • Indeed, much that they do within the realms of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Company *v.* United States, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan *v.* United States, 298 U. S. 468, 480, 481. Interstate Commerce Commission *v.* Louisville & N. R. Co., 227 U. S., 88, 91. The right to such a hearing is one of 'the rudiments of fair play' (Chicago, Milwaukee & St. Paul R. Co. *v.* Polk, 232 U. S. 165, 168) assured to every litigant by the 14th Amendment as a minimal requirement. West Ohio Gas Co. *v.* P. U. Commission, (No. 1), (No. 2), *supra.*"
>
> " 'requiring the taking and weighing of evidence, determination of fact based upon the consideration of the evidence, and the making of an order supported by such findings,' and 'designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations. • • •' "

It is fundamental in the American scheme of government that all acts of administrative agencies are subject to judicial review. Therefore, where there is statutory pro-

vision for a hearing by the administrative agency, the judicial review may be upon the record of the hearing, as the statutes may provide, but where there is no such provision for hearings by the administrative agency, the judicial review must necessarily be by an original hearing in the courts, and the denial of such a hearing is *ipso facto* a deprivation of due process, under the federal constitution.

Moreover, it should be noted that, aside from this effect of the due process clause of the federal constitution, all litigants in the State of New Jersey are guaranteed the right to a judicial review of the acts of administrative agencies under the new constitution of that state which was adopted in 1947. Article VI, Section V, Par. 4 of this constitution reads as follows:

> "Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, *as of right*, except in criminal causes where such review shall be discretionary."

The effect of this provision, under the court rules which have been adopted to implement it, is to give every litigant, including municipal corporations, the right to a judicial review of all acts of administrative agencies. Where the administrative acts are based upon statutory requirements for hearings, the review will be upon the record of such hearings, but otherwise, when there can be no record of a hearing, the review must necessarily be by an original hearing by the court, in effect a trial *de novo*.

The fallacy of appellee's argument is that it ignores the city's right to have an original trial by the court, which is guaranteed to it both by the due process of law clause of the federal constitution and by the specific provision of the State constitution above cited. Appellee contends (p. 6, Appellee's Motion to Dismiss or Affirm): that the city's

right to a judicial review of the action of the Turnpike Authority is limited by the Turnpike Authority Act, which requires "no judicial review *de novo* of the administrative determination, but only a review to determine if the Turnpike Authority had acted reasonably," and upon this premise argues that the city's right to due process was satisfied by the fact that it had been permitted to file "comprehensive" affidavits, and that the review accorded, "albeit on a motion for summary judgment," and with nothing before the court but the affidavits of the parties, "did not deprive appellant 'of its day in court' ".

In other words, appellee contends that because of the limitations of the Turnpike Act the city was not entitled to have its complaint decided by a "trial in the customary mode," but only to have the privilege of submitting affidavits and having them disposed of by a summary judgment, notwithstanding the fact, which appellee nowheres denies, that the city's affidavits had created a sharp issue of fact which would ordinarily have entitled it to a "trial in the customary mode." We submit that this theory of the due process of law is completely repugnant to the expressions which we have above cited, and equally offensive to "the rudiments of fair play:" which are "assured to every litigant by the 14th Amendment."

Perhaps no plainer proof of the city's deprivation of due process can be cited than the language itself of the court below. Chief Justice Vanderbilt states his final conclusion or finding as: "The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion."

This unmistakably implies that the Authority's plans were not exactly "right", and that if they had been further from "right" than the court found them to be they would have been void as an arbitrary exercise of discretion.

This seems to imply a finding by the court that the allegations and affidavits created some doubt as to the propriety of the action of the members of the Turnpike Authority. Certainly a judicial hearing should have been provided to explore such a factual situation in the traditional manner of a trial.

The judgment in the instant case appears all the more in conflict with the Federal decision on the requirements of "due process of law" when we note that the State and Federal Rules for "Summary Judgment" are practically identical.*

Also note that the decisions of the State of New Jersey seemingly follow the Federal decisions previously cited herein on the necessity for a proper review and hearing.

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* *Summary Judgments—*

The Federal Rule 56(c)—"Motion and Proceedings Thereon" reads:

> "The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

State Rule 3:56-3 "Motion and Proceedings Thereon" reads:

> "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than 2 days prior to the date of hearing. The judgment or order sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show palpably that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. A summary judgment or order, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

Thus, in *Lakewood Express Service* v. *Board of Public U. Commissioners*, 1 N. J. 45 (1948), the Court, at page 52, stated:

> "But the federal and state constitutions fix the limit of the exercise of such powers • • • and guarantee to all the equal protection of the laws.
>
> "When the legislature acts directly its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within the limitations. The power of a Court to review, in the situation here presented, was clearly stated by Chief Justice Hughes in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, page 52; 80 L. Ed. 1033; 56 S. Ct. 720 (1936)."

See also *Handlon* v. *Belleville*, 4 N. J. 99 (1950), where at page 105, the Court held:

> "• • • The requirement of a 'hearing' has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The 'hearing' is 'the hearing of evidence and argument.' Morgan *v.* United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1228 (1936); • • •."

POINT II.

The appellant, a municipality, is a proper party in this suit against the appellees.

The appellees attack the right of the City of Newark, appellant, to bring this action on the broad ground that a municipality cannot invoke the provisions of the Fourteenth Amendment against its creator, the State, citing authorities as set forth on page 4 of their Statement opposing Jurisdiction.

None of the cases cited are really in point because the instant case deals, among other things, with property owned by a municipality in a proprietary sense, and those property rights of the citizens of a municipality for whom the City really appears in the capacity of a trustee. The cases cited note the possibility of this difference. But of even greater moment, is the utter disregard by the appellee, the Turnpike Authority, of the position it sought to establish in order to assure its very existence as an agency which could issue bonds on its own credit without in any wise involving the State of New Jersey, i.e., its existence as an agency separate and apart from the State of New Jersey.

The appellant claims this action is not against the State of New Jersey, but is against the Turnpike Authority and certain individual contractors, none of whom constitute the State of New Jersey. As to the latter appellees, we assume that our learned adversaries will not make argument that they are entitled to immunity of the sovereign merely because their contracts are with the Turnpike Authority.

Nor is the Turnpike Authority the State of New Jersey, or its *alter ego*. It is an independent corporate entity, as

was held by the New Jersey Supreme Court in the case entitled *New Jersey Turnpike Authority* v. *Parsons*, 3 N. J. 235, 69 A 2d 875 (1949) to wit:

> "• • • the Turnpike Authority is an independent corporate entity • • •"

and stated,

> "• • • It is objected that the Turnpike Authority is the *alter ego* of the state and not a self-sufficient public corporation because it is a body corporate and politic 'in the State Highway Department' • • •"

in which the court held,

> "• • • • The Turnpike Authority is in but not of the State Highway Department and that fact does not make it any less an independent entity, as the language of the entire Act clearly demonstrates • • •."

On page 246 the court states,

> "• • • the Act makes it clear beyond any possibility of dispute that it was the legislative intent to create an autonomous public corporation • • •"

and in holding Section 17 of the Turnpike Act invalid because it was in contravention of the constitutional mandate that "The credit of the State shall not be directly or indirectly loaned in any case", the court said, on page 247,

> "• • • The Turnpike Authority cannot blow hot and cold in the same breath; it either is an autonomous corporation or it is not."

On the basis of the decision of the Court as aforesaid it is evident that the Turnpike Authority is "not the State", nor the *alter ego* of the State, but an independent corporation.

Likewise, the appellees overlook the provisions of the Turnpike Act itself which permits suits against the Authority.

> "The Authority shall have • • • (power) • • • to sue and be sued in its own name." N. J. R. S. 27:23-5 (d).

This is an unqualified and unlimited right granted to all persons, natural or otherwise, including municipal corporations, to sue the Turnpike Authority for all injuries, and this includes of course, injuries arising out of arbitrary or unreasonable exercise of its delegated powers. It removes all possible controversy on the point of any state immunity, to a challenge by the city of deprivation of due process under the 14th Amendment. Whatever immunity the legislature possessed (and which in any event was not shared by the Authority, part of the executive branch of the government), was expressly waived by the legislature in this provision:

See also:

> *Worcester* v. *Worcester Consolidated*, 196 U. S. 539, 49 L. ed. 591, p. 55 (L. ed. p. 596),

where the Court held:

> "In New Orleans *vs.* New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142, it was held that a municipal corporation • • • It was also held therein that such a corporation, *in respect of its private or proprietary rights and interests*, might be entitled to constitutional protection. The Massachusetts Courts take the same view of such a corporation. Brown *v.* Turner, 176 Mass. 9, 56 N. E. 969."

Conclusion.

The judgment of the Supreme Court of New Jersey should be reversed and the cause remanded for the purpose of affording the appellant a full trial on the issues raised.

Respectfully submitted,

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